

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 337-2018
OF NICHOLAS J. STRICKER,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
AK DRILLING, INC., a Montana)	
corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant Nicholas J. Stricker (Stricker) filed a wage claim on August 28, 2017 asserting AK Drilling, Inc. (AK Drilling) owed him unpaid wages. Stricker asserted he was due bonuses for 1,972,730 feet drilled for mining purposes at \$0.25 per foot, totaling \$493,182.50, of which \$101,066.00 had been paid. His net resulting claim was in the amount of \$392,117.50.

On October 15, 2018, the Wage and Hour Unit issued a determination declining to award wages to Stricker on various grounds. Stricker appealed and, as a result, on March 27, 2019, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH) after attempts at mediation were unsuccessful.

AK Drilling filed a motion for partial summary judgment on the grounds that Stricker, whose claim covers a period from approximately 2008-2017, is not permitted to recover wages going back for a period longer than allowed by statute. AK Drilling's motion was granted, with the caveat that there were disputed facts as to whether recovery was warranted under a two or three year period. A determination as to whether Mont. Code Ann. § 39-3-207(2) or (3) applies was reserved for the hearing on this matter.

Subsequent to the ruling on the partial summary judgment motion, it came to AK Drilling's attention that Stricker may have filed his claim outside the 180-day

timeframe permitted by Mont. Code Ann. § 39-3-207(1). Because the issue was foundational as to whether the claim as a whole could move forward, the Hearing Officer determined it would be best to bifurcate the hearing into separate parts, with the statute of limitations issue being heard before the remaining, substantive portion of the hearing.

The first portion of the bifurcated hearing regarding application of Mont. Code Ann. § 39-3-207(1) was held in this matter in Bozeman, Montana, on November 14, 2019. Anthony King (King), Kathleen Braach (Braach), and Stricker presented sworn testimony. The administrative record (Documents 1-355) was admitted into evidence in its entirety. Claimant's Exhibits 1-2 were admitted without objection. Subsequent to the hearing, and by agreement of the parties, AK Drilling produced a complete copy of a spreadsheet contained in Admin. Docs. 49-50, which were admitted as Respondent's Exhibit 100.

The Hearing Officer issued a decision finding Stricker's claims were not barred by Mont. Code Ann. § 39-3-207(1). The second portion of the bifurcated hearing was held via Zoom on October 6, 2020. Stricker, Renee Crawford, Diana Stricker, Braach, John Simonis, Eric Gortzen, and King presented sworn testimony. Documents already entered into evidence in the first portion of the bifurcated hearing were maintained as evidence at the second portion of the hearing, and Respondent's Exhibits A-TTT were admitted without objection.

The parties submitted post-hearing briefs. Based on the evidence adduced at hearing, the arguments of the parties in their closings, and the parties' post-hearing briefing, the Hearing Officer issues the following decision awarding wages to Sticker.

II. ISSUE

The issue in this case is whether AK Drilling owes bonus amounts, as alleged in the complaint filed by Stricker, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT¹

1. Stricker was employed by AK Drilling from approximately June, 2000, until he departed on June 26, 2017.

2. AK Drilling historically paid discretionary bonuses to employees and had a profit-sharing plan.

¹ Findings are taken from both hearings herein.

3. AK Drilling had a bonus program in place with Stricker, which was the result of a verbal agreement between Stricker and Anthony King (King), the owner of AK Drilling.

4. The bonus system awarded Stricker additional compensation per foot drilled and constituted a method by which Stricker could accrue additional compensation, paid time off, and, over the long-term, a possible retirement fund from which to draw.

5. The bonus agreement between King and Stricker was strictly verbal, but was, at all times relevant herein, based on drilling footage accomplished by Stricker.

6. Stricker was the only employee of AK Drilling with a footage-based bonus agreement.

7. Stricker's bonus was never dependent on his performance outside of feet drilled.

8. Bonus amounts based on footage were earned when footage was drilled.

9. While working in Wyoming on coal bed projects years ago, Stricker earned a \$0.50 bonus for every foot drilled. In or around the fall of 2007, Stricker had a conversation with King about reducing Stricker's bonus to \$0.25 for every foot drilled. That verbal agreement between King and Stricker remained in place until AK Drilling ended the bonus program in January, 2017.

10. The bonus agreement presently at issue does not concern footage drilled in Wyoming.

11. AK Drilling had discretion to end the bonus agreement with Stricker, but did not have discretion over the bonus amounts earned, as they were based on amounts drilled.

12. AK Drilling only provided billing records for drilling from June 8, 2015, through January 18, 2016, when drilling stopped at the Cripple Creek site. A total of 211,307 feet and 11,025 feet were billed out as drilled for those time periods in 2015

and 2016, respectively, for a total of 222,332 feet billed out as drilled. (*See Ex. A.*²) The invoices provided by AK Drilling are only for reverse circulation (RC) drilling footages (as opposed to core drilling, dual rotary (DR) drilling, etc.), and the invoices are all billed at the same rates regardless of the drilling rig used. The exact amounts are set forth as follows:

<u>Billing Date</u>	<u>Total Billed Footage</u>
06/08/2015	5,520
06/15/2015	2,375
06/22/2015	9,580
06/23/2015	5,523
07/01/2015	T3,830
07/14/2015	8,000
07/20/2015	4,220
07/27/2015	13,450
07/31/2015	7,110
08/12/2015	4,000
08/19/2015	15,080
08/25/2015	4,650
08/31/2015	15,510
09/09/2015	6,434
09/16/2015	5,823
09/22/2015	3,430
09/28/2015	14,810
10/05/2015	9,860
10/19/2015	6,030

² Exhibit A displays a different total for 2015 because the total excludes 2,860 feet billed for Rig No. 318 on June 8, 2015, and 3,800 feet and 2,220 feet billed for Rig No. 319 on November 23, 2015, and December 14, 2015, respectively. The Hearing Officer finds that these amounts were inadvertently excluded, and is hereby including them in the total.

<u>Billing Date</u>	<u>Total Billed Footage</u>
10/26/2015	14,370
11/02/2015	3,720
11/09/2015	3,975
11/13/2015	6,100
11/16/2015	3,430
11/23/2015	9,100
12/01/2015	3,580
12/07/2015	2,400
12/09/2015	1,200
12/14/2015	5,120
12/15/2015	5,615
12/28/2015	5,150
12/31/2015	2,600
01/11/2016	4,730
01/18/2016	6,295
Total	222,332

13. From 2014 through 2016, the only records of amounts drilled for the entire time period are from geological records that were relied upon by Stricker and prepared by geologist Jeremy McComas (McComas) on February 26, 2016. These records differentiate between core and RC drilling. (See Admin. Doc. 353; as listed by McComas, RC drilling footage was split between drilling for exploration and mine operations.) The total amounts are set forth as follows:

<u>Year</u>	<u>RC Footage</u>	<u>Core Footage</u>
2014	273,054	4,500
2015	323,052	34,461
2016	20,460	0

14. Because the footages computed by McComas were for geological purposes only and roughly computed after-the fact, they do not necessarily comport with the footage amounts actually billed by AK Drilling. To the extent the amounts differ, the amounts actually billed are a more accurate reflection of amounts drilled than McComas' annual estimates and are broken down by smaller, more specific time periods. AK Drilling did not provide any additional records showing more exact amounts than McComas' records with regard to core drilling footage.

15. Stricker's footage bonus included amounts drilled for both RC and core drilling at a rate of \$0.25 per foot drilled.

16. From 2014 through 2017, AK Drilling made the following bonus payments to Stricker:

<u>2014</u>		<u>2015</u>		<u>2016</u>		<u>2017</u>	
Jan 4	\$120.00	Jan 10	\$140.00	Mar 4	\$76.13	May 7	\$425.00
Jan 11	\$140.00	Jan 17	\$140.00	Apr 2	\$75.87	May 12	\$1,722.00
Jan 18	\$120.00	Jan 24	\$120.00	May 22	\$80.08	May 13	\$425.00
Feb 15	\$180.00	Sep 25	\$59.83	Jun 11	\$41.11	May 25	\$1,088.00
Feb 22	\$120.00	Oct 30	\$65.18	Jun 25	\$27.44	May 26	\$1,722.00
Mar 1	\$40.00	Nov 25	\$44.70	Jul 16	\$33.86	Jun 8	\$5,167.50
Mar 8	\$100.00	Nov 29	\$51.59	Jul 17	\$49.29	Jun 23	\$3,445.00
Mar 15	\$140.00			Aug 8	\$65.49		
Mar 22	\$140.00			Aug 10	\$58.50		
Mar 29	\$40.00			Aug 10	\$54.50		
Apr 16	\$200.00			Aug 13	\$64.71		
Apr 26	\$220.00			Aug 13	\$1,410.50		
May 10	\$140.00			Aug 15	\$35.56		
May 10	\$794.46			Aug 21	\$36.98		
May 17	\$140.00			Aug 30	\$30.63		
May 24	\$120.00			Sep 24	\$33.51		
Jun 7	\$60.00			Oct 1	\$27.86		
Jun 14	\$120.00			Oct 1	\$1,040.00		

	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>
Jun 21	\$140.00		Nov 1	\$43.92
Jun 28	\$60.00		Nov 16	\$69.95
Jul 12	\$140.00		Nov 22	\$40.47
Jul 19	\$140.00		Nov 22	\$26.57
Jul 25	\$120.00		Dec 13	\$119.95
Aug 2	\$120.00		Dec 21	\$21.49
Aug 8	\$2,087.50		Dec 26	\$27.39
Aug 9	\$250.00		Dec 27	\$16.95
Aug 16	\$250.00			
Aug 22	\$3,312.50			
Aug 23	\$250.00			
Aug 30	\$250.00			
Sep 5	\$3,312.50			
Sep 6	\$100.00			
Sep 13	\$140.00			
Sep 20	\$100.00			
Sep 27	\$100.00			
Oct 4	\$120.00			
Oct 11	\$80.00			
Oct 18	\$120.00			
Oct 25	\$100.00			
Nov 8	\$140.00			
Nov 15	\$120.00			
Nov 22	\$80.00			
Dec 6	\$140.00			
Dec 13	\$140.00			
Dec 20	\$140.00			

17. In total, Stricker was paid bonuses of \$14,986.96 in 2014, \$621.30 in 2015, \$3,591.66 in 2016, and \$13,995.59 in 2017. For the relevant two-year time period from the filing of his claim (i.e., from September 25, 2015, through June 23, 2017), Stricker was paid \$17,808.55 in bonuses.³

18. The footage bonus was not implemented to promote safety, nor was it based on Stricker's supervision of RC drill rigs, nor was not tied to client satisfaction. The footage bonus was also not discretionary on the part of AK Drilling.

19. Stricker worked for AK Drilling at a site in Cripple Creek, Colorado, from approximately 2008 through 2016.

20. Stricker worked as a manager of the Cripple Creek site for approximately three years prior to March, 2016.

21. In more recent years, including all times relevant herein, Stricker did not receive bonus payments as regular income. Instead, and completely at his own discretion, he would turn in time cards with certain items marked with stars. Those items would be paid out as necessary and denoted as per diem or reimbursements to Stricker. Those payouts were bonus payments.

22. Stricker would also sometimes turn in time cards to be paid for periods he was not actually working, and AK Drilling would pay him. Those payouts were bonus payments.

23. Stricker's method of requesting bonus payments as he did was up to his discretion and was part of the agreement.

24. AK Drilling was aware of and consented to Stricker's time card practices and, with exceptions only relating to the current dispute, paid out whatever Stricker requested, generally with authorization from King.

25. AK Drilling's office manager, Braach (formerly known as Kathleen Hackman and referred to as such in most documents) (Braach), was primarily responsible for "back office" matters at AK Drilling, including payment of bills and handling of receipts. Braach, along with King, was listed as a "director" in AK Drilling's 2017 annual report filed with the Montana Secretary of State.

³ As discussed below, the Hearing Officer concludes that Stricker is limited by the two-year time period.

26. AK Drilling, and specifically Braach, kept a spreadsheet log of all types of bonus payments made to Stricker. AK Drilling's spreadsheet shows a total of \$101,066.39 was paid by it to Stricker in various forms of bonus payments from August, 2009, to June, 2017. The parties sometimes called bonuses "per diem," but it was agreed that they were all bonus payments.

27. AK Drilling lost its contract at the Cripple Creek site in or around March, 2016, while Stricker was managing it. King partially blames Stricker for the loss of the contract, while Stricker blames King.

28. In January, 2017, AK Drilling announced it was no longer paying bonuses. The decision was prompted in part by the loss of the Cripple Creek work.

29. Stricker interpreted the end of AK Drilling's bonus program to mean he could no longer accrue additional earnings for drilled footage, but not to mean he could no longer draw on amounts earned for footage drilled in the past.

30. Although Stricker was not always actually working, he continued to submit time cards in 2017—following the end of the bonus program—for which he was paid.

31. Specifically, Stricker submitted time cards for payment of wages in or around May, 2017. Stricker was not working for the time periods covered by the time cards. Steve Alford (Alford), the then-Chief Operating Officer (COO) of AK Drilling, was not privy to Stricker's bonus agreement and questioned certain payments requested by Stricker in light of AK Drilling's discontinuation of the bonus program in January, 2017, and the fact Stricker had not actually been working.

32. King ultimately authorized payment to Stricker on the time cards, even though Stricker was not actually working.

33. \$13,995.00 in payments made to Stricker from January 1, 2017, through June 23, 2017, were tracked by AK Drilling on its spreadsheet log of Stricker's bonus payments.

34. Stricker formally ended his employment relationship with AK Drilling on or about June 26, 2017.

35. AK Drilling never denied a bonus payment to Stricker from the start of 2017 through the end of his employment.

36. The incident in or around May, 2017, was the only time Stricker ever had issues with collecting a payment on the bonus agreement prior to the end of his employment.

37. In an August 11, 2017, e-mail correspondence between Stricker and King, King stated to Stricker, "I don't deny AKD owes u funds but like I said not the amount or terms that are stuck in your head." (Admin Doc. 267.)

38. Stricker filed a wage claim on August 28, 2017. Stricker asserted he was due bonuses for 1,972,730 feet drilled at \$0.25 per foot, totaling \$493,182.50, of which \$101,066.00 had been paid. His net resulting claim was in the amount of \$392,117.50.

39. Although the period of the claim on the Wage Claim Form was filled out by Stricker as running from January 1, 2008, to January 1, 2017, his calculation stated the wage claim was for footage drilled from 2008 to the end of approximately March, 2016.

IV. DISCUSSION

A. Bonus Amount Owed

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *America's Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 321 P.3d 95 (citing *Garsjo v. Dept. of Labor & Indus.*, 172 Mont. 182, 189, 562 P.2d 473, 476-77 (1977) (citing and adopting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))) (other citations omitted).

To meet this burden, the employee must produce sufficient evidence showing the amount and extent of such work as a matter of just and reasonable inference. Once an employee has shown as a matter of just and reasonable inference that wages have been earned but not paid, the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference drawn from the evidence of the employee. If the employer fails to produce such evidence, the employee is entitled to judgment in his or her favor, *even though the amount is only a reasonable approximation*.

America's Best Contractors, Inc., ¶ 25 (internal citations omitted) (emphasis added). Employers are required to keep records of employees' hours. Admin. R. Mont.

24.16.6102(1)(g); *see also* *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 16, 378 Mont. 324, 343 P.3d 1222 (citations omitted). “When an employer fails to record an employee’s hours, the employee’s records may be used to determine the amount of time worked.” *Arlington*, ¶ 16.

If an employee has already left employment at the time a wage claim is filed, “. . . an employee may recover wages and penalties . . . for a period of 2 years prior to the date of the employee’s last date of employment.” Mont. Code Ann. § 39-3-207(2). However, “[i]f an employer has engaged in repeated violations, an employee may recover wages and penalties . . . for a period of 3 years prior to the date of the employee’s last date of employment.” Mont. Code Ann. § 39-3-207(3).

Montana’s laws require that employees be compensated for all wages due them at the termination of employment. Mont. Code Ann. § 39-3-205. Under Montana law, the term “wages” include bonuses: “‘Wages’ includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus[es]. . . .” Mont. Code Ann. § 39-3-201(6)(a).

A claimant must establish they are entitled to a bonus under the terms of an employment agreement. *See Berry v. KRTV Communs., Inc.*, 262 Mont. 415, 426, 865 P.2d 1104, 1111 (1993). The existence of a contract requires that there be: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. Mont. Code Ann. § 28-2-102. There is no evidence that any of the foregoing elements is missing from the verbal bonus agreement between AK Drilling and Stricker. AK Drilling argues, though, that because the agreement between AK Drilling and Stricker was verbal and informal, and the parties now disagree over terms, there was no meeting of the minds between the parties and therefore no enforceable bonus agreement. *See Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693 (regarding contractual elements and consent); Mont. Code Ann. § 28-2-303 (consent is not mutual unless the parties all agree upon the same thing in the same sense). The Hearing Officer finds, however, that there clearly was a meeting of the minds based on the parties’ actions and the carrying out of the bonus agreement. Therefore, the parties had a valid enforceable contract to pay Stricker bonuses.

Given that the parties actually operated under and acted upon a bonus agreement with payments to Stricker, AK Drilling next argues that the parties’ present disagreement over the terms of the bonus agreement means bonuses were discretionary in that AK Drilling had the discretion to choose to not pay Stricker. Generally speaking, where a payment characterized as a “bonus” is not based on earned compensation and is only payable in the sole discretion of the employer, it is

in the nature of a gratuity, not recoverable in a wage claim. *See Talon Plumbing & Heating, Inc. v. State Dep't of Labor & Indus.*, 2008 MT 376, ¶ 31, 346 Mont. 499, 198 P.3d 213. Here, though, the parties both agree that a bonus program existed between AK Drilling and Stricker based on footage drilled. There was nothing discretionary about the bonus amount being directly tied to footage drilled. With the exception of which forms of drilling were included in Stricker's bonus, the dispute here relates to the period of recovery. In particular, the parties dispute whether Stricker could "bank" bonuses and, to the extent bonus monies were paid, for what period of time those payments should be credited, if at all. As set forth below, these disputes may be resolved by applying the statutory timeframes applicable to all wage claims, and do not have the effect of rendering the bonus agreement discretionary or otherwise unenforceable.

Given that bonuses are, by definition, wages under the law, the Hearing Officer finds no basis to treat the bonus payments differently than wages. If an individual is paid wages but then makes a wage claim based on minimum wage or overtime violations, the amounts owed are based on the hours worked versus the amounts paid (or unpaid, as the case may be) during the prior two or three year period, as applicable. *See* Mont. Code Ann. § 39-3-207(2)-(3); *see also* *Watters v. City of Billings*, 2019 MT 255, ¶ 46, 397 Mont. 428, 451 P.3d 60 (noting that the statutory recovery period applies to both wages and penalties). A claimant would never be able to claim they are owed wages beyond the statutory timeframe or that unpaid wages accrued if not demanded, nor could an employer use older wages to offset present shortfalls. *Id.* Amounts earned and paid are strictly bounded within the confines of the recoverable period. Mont. Code Ann. § 39-3-207(2)-(3).

Here, drilling footage is akin to hours worked, and bonuses, as wages, should be treated no differently than wages in terms of the recoverable period. Stricker fully admits that bonuses were earned when footage was drilled. He also admits that AK Drilling never denied a bonus payment until the present dispute arose. However, Stricker would also have the Hearing Officer conclude that he "banked"—or accrued—bonuses for several years, and so the full amount owed since 2008 came due when Stricker left his employment with AK Drilling. Were a claimant allowed to "bank" unpaid bonuses or wages as Stricker argues, there would literally be no limit to the recoverable period, which is an absurd result and would entirely defeat the purpose of Mont. Code Ann. § 39-3-207.

Stricker also confuses language regarding accrual with his notion of banking bonuses. A wage claim accrues when an employer's duty to pay the employee matures and the employer fails to pay the employee. *Jensen v. State*, 2009 MT 246, ¶ 11, 351 Mont. 443, 214 P.3d 1227 (citing *Craver v. Waste Mgt. Partners of Bozeman*, 265 Mont. 37, 44, 874 P.2d 1, 2 (1994)). When an employer continually fails to

pay on a monthly basis, the employee's wage claims accrue on a monthly basis. *Id.* This language does not mean amounts owed continue to grow *ad infinitum*, but rather only means that the 180-day time period for filing wage and hour claims pursuant to § 39-3-207(1) starts anew with each successive non-payment of wages. *Jensen*, ¶ 14. It was always within Stricker's own control to recover more bonus monies than are now available to him. It was at Stricker's own peril that he chose not to request full bonus amounts when footage was drilled. It was also at Stricker's own peril that he did not submit a wage claim at an earlier date. *See Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶¶ 30-31, 373 Mont. 92, 100, 314 P.3d 920 (discussing the non-application of Mont. Code Ann. § 27-2-202 to wage and hour claims; amounts due in wage and hour disputes must have been earned and cannot be based on prospective wage losses as the result of contractual breaches). Stricker waited to collect bonus monies and is bound by the applicable rules and laws. *Id.*

Stricker argues he should be permitted to extend the period of recovery for, at a minimum, an additional year based on the language of Mont. Code Ann. § 39-3-207(3), which states: "If an employer has engaged in repeated violations, an employee may recover wages and penalties for a period of 3 years from the date on which a claim is filed if the employee is still employed by the employer or for a period of 3 years prior to the date of the employee's last date of employment." Stricker argues that every time AK Drilling denied his claim after he ended his employment, it was a repeated violation warranting implementation of a three-year recovery period. Although Stricker did not agree there should be any time-period limitation on recovery, if limited, he asserted he was due \$129,187.50 for three years' of unpaid bonuses, and that the \$101,066.39 he was paid from August, 2009, to June, 2017, should be strictly applied to bonus amounts earned prior to that time period.

The Hearing Officer does not share Stricker's view of what he is owed. AK Drilling never denied bonus payments to Stricker until he left his employment. When, after quitting his job, Stricker demanded immediate and full payment going back several years, a legitimate dispute arose between the parties. As evidenced by this decision, Stricker was not due the amount he was claiming, and the fact that the parties could not agree on an amount owed does not amount to a repeated violation based on a plain language meaning of "repeated." *See Clouse v. Lewis & Clark Cnty.*, 2008 MT 271, ¶¶ 49-51, 345 Mont. 208, 220, 190 P.3d 1052, 1060 (applying a plain language meaning of "repeated" and finding it applied in a situation where the employer failed to calculate salary and longevity properly for more than one employee, failed to correct the mistake after one pay period, and failed to recalculate longevity correctly after its error had been brought to its attention, although noting that being placed on notice of a violation is not a requirement of the statute). As such, the two-year limitation of Mont. Code Ann. § 39-3-207(2) applies to this matter.

Stricker's last day of employment with AK Drilling was June 26, 2017. The relevant time period for his claim runs for the two years prior to that date (i.e., June 27, 2015, through June 26, 2017, since the time period is inclusive of the last day worked). *See* Mont. Code Ann. § 39-3-207(2). The first bonus payment Stricker received that falls within the two-year time period was on September 25, 2015, and the last bonus payment was on June 23, 2017. In total during that period, Stricker was paid \$17,808.55 in bonus monies. For the same reason as Stricker is limited to the two year time period, as set forth above, the Hearing Officer cannot credit AK Drilling with bonus monies paid to Stricker prior to this timeframe.

Regarding the amount of drilling that occurred, AK Drilling only provided records for RC drilling, and there is a dispute about which footage (e.g., RC only versus RC and core, etc.) was the subject of bonuses. The Hearing Officer finds Stricker's testimony that he was to receive footage bonuses for all drilling footage, not only RC footage, more credible and consistent with the parties' description of the verbal bonus agreement.

The Hearing Officer also finds that the amounts billed are more accurate than the numbers from McComas' geological report, not only because they were actually invoiced to the client, but also because they are more specific and broken down by much smaller date ranges.⁴ Because the billed amounts do not include core footage, however, McComas' report, provided by and relied upon by Stricker, is the only source of those numbers. As stated above, when an employer fails to keep records, an employee's records may be used to determine amounts owed. *See Arlington*, ¶ 16.

There was a clear agreement between the parties—which was acted upon and honored by AK Drilling as evidenced by the bonus spreadsheet—that Stricker was owed \$0.25 per foot drilled at the Cripple Creek site. From July 1, 2015, through January 18, 2016, 199,622 feet were billed for RC drilling. Because the billing period ending July 1, 2015, encompasses amounts billed from June 24, 2015, through that date, the Hearing Officer finds it appropriate to pro-rate that week to 1,617 feet ($\frac{4}{7} \times 3,830$), which results in a total of 197,409 feet ($199,622 - 3,830 + 1,617$) of RC drilling from June 27, 2015, through January 18, 2016. No core footage was drilled in 2016, and 34,461 feet were drilled for all of 2015 according to the McComas report, which does not break down footage into smaller time periods. The Hearing Officer again finds the best way to calculate a bonus on core footage is to pro-rate the

⁴ Stricker argues McComas' numbers are more accurate because (without supporting proof) the only reason they were drafted was to calculate Stricker's bonus payments. It is apparent from the document itself, however, that the document had some connection to calculations of AK Drilling's costs for 2015 in particular and the differentiation between costs for different types of drilling.

annual drilled amount from June, 27, 2015, through December 31, 2015 (i.e., 188 days). This works out to approximately 17,750 feet ($188/365 \times 34,461$). In total, then, 215,159 feet ($197,409 + 17,750$) were drilled during the relevant time period, which results in a bonus of \$53,789.75 ($215,159 \times \0.25).

Based on the foregoing, Stricker is owed \$35,981.20 ($\$53,789.75 - \$17,808.55$) in unpaid bonuses.

B. Penalties Owed

AK Drilling has not, at this point, paid anything toward Stricker's unpaid bonus amounts. As required under the law, a penalty equal to 55% of unpaid bonus amounts must be applied, but can go as high as 110% if special circumstances exist. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7535, 24.16.7556, 24.16.7566. Special circumstances justifying a maximum penalty are set forth as follows:

(1) The following conduct by the employer constitutes special circumstances that justify the imposition of the maximum penalty allowed by law:

(a) the employer fails to provide information requested by the department and/or does not cooperate in the department's investigation of the wage claim;

(b) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;

(c) the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim; or

(d) the employer has issued an insufficient funds paycheck.

(2) Exceptions may be made in instances where the employee has failed to provide records or information necessary for the employer to make final payroll calculation and issue the final paycheck.

(3) The maximum penalty is mandatory under the above circumstances and may be reduced only upon the written mutual agreement of the parties and the department.

Admin. R. Mont. 24.16.7556(1)-(3). Only two possible circumstances potentially justify imposition of a 110% penalty (contrary to Stricker's assertions, the Hearing Officer does not find that AK Drilling's denials of Stricker's demand for payments of bonus amounts well in excess of what is awarded here amounted to repeated violations of the wage and hour statutes).

With regard to the first possible special circumstance, Braach did provide a printout of a spreadsheet of Stricker's bonus payouts that was incomplete. When the parties discovered the spreadsheet was incomplete, however, Braach provided an electronic copy which contained the missing information. The Hearing Officer is led to believe the printout only mistakenly failed to include the entire document based on the print area set for the spreadsheet, and was not done in an act to intentionally mislead anyone.

With regard to the second possible special circumstance, the Wage and Hour Unit's dismissal (Admin. Docs. 23-26) contains opposing but valid legal arguments regarding its dispute of the bonus agreement. AK Drilling should not be penalized for protecting its interests in those proceedings. Although the dismissal does contain some statements showing possible misrepresentations by AK Drilling, those statements are hearsay. Furthermore, AK Drilling did provide a copy of the spreadsheet and other documents showing that some kind of bonus agreement existed, even if AK Drilling did not agree that Stricker was owed anything.

In light of the foregoing, the Hearing Officer finds there is no basis to impose the maximum penalty of 110%. As such, a penalty of 55%, or \$19,789.66, is imposed on the bonus award herein.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. §§ 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Stricker timely filed a wage and hour claim within the 180-day period provided for under Mont. Code Ann. § 39-3-207(1).

3. A valid, non-discretionary bonus agreement existed between Stricker and AK Drilling. Mont. Code Ann. §§ 28-2-101 *et seq.*

4. There were no repeated violations of the wage and hour laws by AK Drilling, and the period of recovery is therefore limited to two years, from June 27, 2015, through June 26, 2017. Mont. Code Ann. § 39-3-207(2).

5. Stricker is owed unpaid bonus amounts totaling \$35,981.20. Mont. Code Ann. §§ 39-3-201(6)(a), -205.

6. A 55% penalty of \$19,789.66 is imposed on the bonus due Stricker. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7535, 24.16.7556, 24.16.7566.

VI. ORDER

AK Drilling is hereby ORDERED to tender a cashier's check or money order in the amount of \$55,770.86, representing \$35,981.20 in unpaid bonus amounts and penalties in the amount of \$19,789.66, made payable as requested by Stricker. AK Drilling may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing penalties. All payments shall be mailed to **Department of Labor and Industry, Wage and Hour Unit, P.O. Box 201503, Helena, Montana, 59620-1503.**

DATED this 21st day of July, 2021.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.